

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH MASSEY and DEPARTMENT OF THE AIR FORCE,
McCLELLAN AIR FORCE BASE, Calif.

*Docket No. 97-830; Submitted on the Record;
Issued May 3, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether appellant has met his burden of proof to establish that he sustained neck and back conditions caused by factors of his federal employment.

The Board has duly reviewed the case record in this appeal and finds that this case is not in posture for decision.

On May 13, 1992 appellant, then an aircraft worker, filed a claim for an occupational disease (Form CA-2) alleging that on November 13, 1985, he injured his back, legs and right shoulder while moving a work stand from one side of the aircraft to the other side. Appellant stopped work on December 7, 1990.¹

By letter dated January 14, 1993, the Office of Workers' Compensation Programs referred appellant, along with medical records, a statement of accepted facts and a list of specific questions to Dr. Robert Barrack, a Board-certified orthopedic surgeon, and Dr. Reynold Wong, a Board-certified dermatologist, for a second opinion examination. By letters of the same date, the Office advised Drs. Barrack and Wong of the referral.²

By decision dated April 15, 1993, the Office found the medical evidence of record insufficient to establish that appellant's back and neck conditions were causally related to factors of his federal employment. In so doing, the Office accorded greater weight to Dr. Barrack's opinion that appellant's conditions were not caused by the November 13, 1985 incident. In a May 14, 1993 letter, appellant requested an oral hearing before an Office representative.

¹ Appellant was separated from the employing establishment effective March 1, 1991 due to a failure to properly request leave for the period beginning December 7, 1990.

² The Office canceled appellant's appointment with Dr. Wong and amended its statement of accepted facts.

By decision dated August 16, 1994, the hearing representative affirmed the Office's April 15, 1993 decision. In letters dated July 27 and 28 1995, appellant requested reconsideration of the hearing representative's decision.

In an August 16, 1995 letter, appellant, through his counsel, requested reconsideration of the Office's decision accompanied by medical evidence. By decision dated August 30, 1995, the Office denied appellant's request for modification based on a merit review of the claim.

In an August 13, 1996 letter, appellant, through his counsel, requested reconsideration of the Office's decision accompanied by medical evidence. By decision dated September 25, 1996, the Office denied appellant's request for modification based on a merit review of the claim.

Section 8123(a) of the Federal Employees' Compensation Act provides that if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.³

In this case, the Office referred appellant to Dr. Barrack for a second opinion examination. He submitted a February 18, 1993 medical report indicating a history of the November 13, 1985 injury and appellant's employment, a review of medical records, and his findings on physical examination. Dr. Barrack diagnosed chronic degenerative disc disease in the cervical and lumbar spine. He opined that appellant had a permanent impairment based on specific subjective and objective factors. Dr. Barrack further opined that appellant's impairment had stabilized and that appellant had a disability that would restrict him on a prophylactic basis. He stated that appellant had a chronic degenerative process that was not significantly related to the relatively minor episodes of trauma which he described. Dr. Barrack further stated that the history that appellant gave, together with the physical examination and findings on radiographs were most consistent with a natural progression of a chronic degenerative process. He additionally stated that it was unlikely that the single, minor episode of trauma which appellant related significantly accelerated or aggravated this process. Dr. Barrack concluded that the relationship to the employment would be very negligible.

In support of his claim, appellant submitted a June 18, 1996 medical report of Dr. Arthur M. Auerbach, a Board-certified orthopedic surgeon, revealing a history of appellant's employment and the November 13, 1985 injury, his findings on physical and neurological examination, and a review of medical records, including magnetic resonance imaging (MRI) scan. Dr. Auerbach diagnosed chronic degenerative disc disease. He noted subjective and objective factors of appellant's disability and work restrictions based on these factors. Dr. Auerbach opined that appellant's condition was causally related to the November 13, 1985 injury and that it was subsequently aggravated by appellant's intermittent periods of regular work dispersed with light work. He stated that the aggravation increased and accelerated the degenerative disc disease permanently. Dr. Auerbach noted that changes occurred, including the development of an annular tear at L5-S1, an increase in spondylitic changes at L4-5 and L5-S1, an increase in facet degenerative joint changes at L4-5, and the development at L4-5 later on

³ 5 U.S.C. § 8123(a); *see also Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

over the years of a moderate sized posterior central and left L4-5 disc extrusion resulting in lateral end compression of the anterior thecal sac with a mild degree of lumbar spinal stenosis. In addition, he noted that appellant had a degree of chronic mild sciatica into the right lower extremity most probably involving the L5 nerve root and the S1 nerve root. Further, Dr. Auerbach noted that appellant had developed a degree of lumbar spinal stenosis at L4-5 which had led to a mild degree of intermittent neurologic claudication into the right lower extremity. He opined that appellant had been totally disabled and unable to work for the employing establishment since late 1990. Dr. Auerbach further opined that there was no evidence that appellant had a preexisting symptomatic nonindustrial degenerative disc disease or natural progression of such a disease. He also opined that there was significant evidence that appellant had a specific on-the-job injury on November 13, 1995 which caused symptomatology waxing and waning over the years finally leading appellant to stop work in late 1990. Dr. Auerbach then stated that the MRI scan findings in themselves must be taken with a grain of salt because they do not necessarily correlate with a patient's symptoms. He explained that there were studies showing that a patient may have certain conditions and suffer no symptoms. Dr. Auerbach further explained that MRI studies must only be correlated with specific clinical symptomatology and objective findings before any conclusions as to the relationship with those symptoms and findings can be made to the specific MRI scan. He concluded that it was an exercise in futility to review MRIs and discuss whether or not those specific MRIs were related to problems that occurred years before. Dr. Auerbach further concluded that appellant was symptom-free and able to perform his regular work load until November 13, 1985.

In view of the discrepancies between the opinions of Drs. Auerbach and Barrack, the Board finds that there is a conflict in the medical opinion evidence as to the cause of appellant's back condition and, therefore, the case will be remanded. On remand, the Office should prepare a statement of accepted facts and refer it, together with appellant and the case record, to an impartial Board-certified specialist in the appropriate field of medicine, to resolve the conflict as to whether appellant's back condition was caused by factors of his federal employment pursuant to 5 U.S.C. § 8123(a). Following this and such further development as the Office deems necessary, a *de novo* decision should be issued on appellant's occupational disease claim.

The September 25, 1996 decision of the Office of Workers' Compensation Programs is hereby vacated and the case is remanded to the Office for further development consistent with this decision of the Board.

Dated, Washington, D.C.
May 3, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member